UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MELISSA MAYS, individually and as next friend of three minor children, MICHAEL MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN AND RHONDA KELSO, individually and as next friend of one minor child, all on behalf of themselves and a class of all others similarly situated,

Plaintiffs,

-vs-

LOCKWOOD, ANDREWS & NEWNAM, P.C. a Michigan Corporation, LOCKWOOD, ANDREWS & NEWNAM, INC., a Texas Corporation and LEO A. DALY COMPANY, a Nebraska corporation, VEOLIA NORTH AMERICA,, INC., a Delaware Corporation, VEOLIA NORTH AMERICA, LLC, a Delaware Limited Liability Company, VEOLIA WATER NORTH AMERICA OPERATING SERVICES, LLC, a Delaware Limited Liability Company, VEOLIA ENVIRONNEMENT, S.A., a French transnational corporation,

Defendants.

2:16-cv-11480-JCO
HON. JOHN CORBETT O'MEARA

____/

**DEFENDANTS
LOCKWOOD, ANDREWS & NEWNAM, P.C.'S AND
LOCKWOOD, ANDREWS & NEWNAM, INC.'S
AMENDED RULE 12(b)(6) MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Lockwood, Andrews & Newnam, P.C. and Lockwood, Andrews & Newnam, Inc. ("LAN Defendants") move to dismiss Plaintiffs' First Amended Complaint for Injunctive and Declaratory Relief [and] Money Damages for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The Court is referred to the accompanying Brief in Support for the legal arguments and authority supporting this Motion.

In accordance with Local Rule 7.1, counsel for the LAN Defendants conferred with counsel for Plaintiffs, Paul Novak, regarding this Motion on February 14, 2017, explaining the nature of the Motion and its legal basis, but did not obtain concurrence in the relief sought. Accordingly, the Motion is ripe for determination by the Court.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS LOCKWOOD, ANDREWS & NEWNAM, P.C. and LOCKWOOD, ANDREWS & NEWNAM, INC.

Dated: February 16, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MELISSA MAYS, individually and as next friend of three minor children, MICHAEL MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN AND RHONDA KELSO, individually and as next friend of one minor child, all on behalf of themselves and a class of all others similarly situated,

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HON. JOHN CORBETT O'MEARA

Plaintiffs,

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Defendants.

____/

BRIEF IN SUPPORT OF DEFENDANTS LOCKWOOD, ANDREWS & NEWNAM, P.C.'S AND LOCKWOOD, ANDREWS & NEWNAM, INC.'S AMENDED RULE 12(B)(6) MOTION TO DISMISS FIRST AMENDED COMPLAINT

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STATEMENT OF ISSUES PRESENTED

Whether Plaintiffs' First Amended Complaint contains the necessary factual assertions and specificity to state Plaintiffs' various causes of action?

Whether Plaintiffs' First Amended Complaint states a cause of action for any of the four theories brought under 42 U.S.C. § 1983, given the lack of the requisite state action by these Defendants?

Whether Plaintiffs' First Amended Complaint states a cause of action for declaratory relief?

Whether Plaintiffs have sufficiently alleged and the law allows for the recovery of punitive damages in these circumstances?

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

RULES
Fed.R.Civ.P. 12(b)(6)

Fed.R.Civ.P. 8(a)

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Matoon v. Pittsfield, 980 F.2d 1 (1st Cir. 1992)

Middlesex Cty. Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981)

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Seasword v. Hilti, Inc., 449 Mich. 542; 537 N.W.2d 221 (1995)

INTRODUCTION

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Lockwood, Andrews & Newnam, P.C. and Lockwood, Andrews & Newnam, Inc. ("LAN Defendants") move to dismiss Plaintiffs' First Amended Complaint for Injunctive and Declaratory Relief [and] Money Damages ("FAC" or "Complaint") for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

A federal complaint is intended to be a concise statement of facts giving rise to legal claims, providing defendants fair notice of the allegations made against them. It is not intended to be a treatise, press release or manifesto. While Plaintiffs' Complaint is voluminous, it fails in its essential purpose: it does not state relevant *facts* showing the basis of its legal claims against each particular defendant. Instead, it lumps together the defendants—seven private engineering firms from two separate corporate families, makes general statements largely irrelevant to the supposed claims and attempts to state claims merely by reciting their elements. The Complaint is irremediably flawed and should be dismissed.

None of the four theories brought under 42 U.S.C. § 1983 is actionable because of the Complaint's lack of specific pleading and the existence of the requisite state action by these Defendants sufficient to state a cause of action. Alternatively, Plaintiff's constitutional claims are preempted by the federal Safe

Drinking Water Act ("SDWA"). The factual allegations underlying the request for punitive damages are insufficient to allow the recovery of such damages, which are nonetheless unrecoverable in these circumstances. Declaratory relief is not appropriate here for the same reasons.

I. ALLEGATIONS OF THE COMPLAINT

The FAC (**Exhibit A**) spans thirty-five (35) pages and contains one hundred and sixteen (116) numbered paragraphs. Plaintiffs allege that "Defendants" were "retained by the City of Flint, Flint Emergency Managers and the State of Michigan, in November 2014 and February 2015, to provide professional assistance regarding the use [of] Flint River water as a primary source of drinking water" and did not comply with the standard of care when they failed to inform Flint that, "without adequate corrosion control treatment," Flint was in violation of Environmental Protection Agency ("EPA") regulations which caused lead poisoning of Flint water users (Complaint, ¶¶ 1-3). Although specifically acknowledging that Defendants are "private corporations," Plaintiffs contend that Defendants participated in a conspiracy by assisting public officials to deliberately violate Plaintiffs' constitutional rights "when they took from Plaintiffs safe drinking water and replaced it with what they knew to be a highly toxic alternative solely for fiscal purposes" (Complaint, ¶¶ 1,4). The Complaint alleges that "Defendants" were "retained" to provide professional assistance regarding the use of Flint River water, but Plaintiffs fail to attach the actual retention document(s) ("contract") to their Complaint.

Plaintiffs present four Counts against "Defendants" under 42 U.S.C. ¶ 1983: Substantive Due Process – State Created Danger (Complaint, Count I, ¶¶ 69-77); Substantive Due Process – Bodily Integrity (Count II, ¶¶ 78-84); Equal Protection (Count III, ¶¶ 85-92); and Invidious Racial Animus (Count IV, ¶¶ 93-96). The remaining counts of the Complaint are for Professional Negligence (Count V, ¶¶ 97-108) and for Fraud (Count VI, ¶¶ 109-116), pled against the "Veolia Defendants," only.

II. STANDARDS GOVERNING MOTION TO DISMISS

Rule 8(a) of the Federal Rules of Civil Procedure requires a plaintiff to submit a short and plain statement sufficient to demonstrate his entitlement to relief. Fed.R.Civ.P. 8(a). The requisite "short and plain statement" must be sufficient to demonstrate the plaintiff's entitlement to relief and to give "defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "To survive a motion to dismiss a complaint must contain sufficient factual matter accepted as true to state a claim to relief that is plausible on its face." *Id*. The obligation to provide the "grounds" for the pleader's "entitlement to relief" requires more than labels and conclusions; a formulaic recitation of the elements of a cause of action is insufficient. *Bell Atl. Corp. v. Twombley*, 550 U.S. 544, 555 (2007). The Court need not accept legal conclusions or unwarranted factual inferences or legal conclusions masquerading as factual allegations. *Philadelphia Indem. Inc. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir. 2013); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 274 (6th Cir. 2010). Only well-pleaded *facts* are entitled to be construed liberally in favor of the party opposing the motion to dismiss. *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d. 716, 726 (6th Cir. 1996). "[T]he burden rests on the plaintiffs to provide fair notice of the grounds for the claims made against each of the defendants." *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008).

III. PLAINTIFFS IMPERMISSIBLY ENGAGE IN GROUP PLEADING

The Complaint fails to meet the minimum pleading requirements of Fed. R. Civ. P. 8. Pleadings that collectively refer to all defendants generally fail to provide fair notice. *See Marcilis v. Township of Redford*, 693 F.3d 589, 596 (6th Cir. 2012) ("[B]y lumping all defendants together in each claim and providing no factual basis to distinguish their conduct, [the plaintiff's] complaint failed to satisfy the minimum standard" (internal citation omitted)). "[B]asic pleading requirements dictate that plaintiff must attribute factual allegations to *particular* defendants." *Franklin v. Federspiel*, 2011 WL 3031311 at *2 (E.D. Mich. July 25, 2011) (**Exhibit B**). Generalized allegations directed to "defendants" are insufficient. This rule is particularly strong when applied to claims of violations of constitutional rights. *See, e.g., Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008).

The FAC violates this principle in a variety of ways. First, the Complaint groups the LAN Defendants with the Veolia entities, frequently referring to all seven corporate entities as "Defendants" (Complaint, ¶¶ 1-6, 27, 69-101). In some instances, all of the "Defendants" are alleged to have committed the very same act, an allegation that is hardly plausible. Obviously, it strains credibility past the breaking point that every Defendant could have committed every act attributed to "Defendants" generally. Moreover, Plaintiffs appear to have drafted the FAC in large part by simply inserting the Veolia Defendants into many of the allegations of Plaintiffs' original complaint which were stated against the LAN Defendants, only. This lack of specificity and use of "group pleading" as to seven separate corporate entities is fatal to Plaintiffs' Complaint.

Plaintiffs also fail to distinguish between the various LAN-related entities, employing the collective "LAN" to refer to all three. The Complaint provides no justification for treating three acknowledged separate legal entities in this fashion. The rule against group allegations applies even when related corporate entities are involved. Absent abuse of the corporate form, Michigan presumes that parent and subsidiary corporations are separate and distinct entities.

Seasword v. Hilti, Inc., 449 Mich. 542, 547-548; 537 N.W.2d 221, 224 (1995). *See also SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 423 (4th Cir. 2015) (corporate affiliation does not alter requirement to identify involvement of each defendant). Plaintiffs do not plead abuse of the corporate form, alter ego, or any other basis to disregard corporate separation. They plead only that "LAN PC was created by LAN INC." and that, upon information and belief, "the vast majority of services provided by LAN PC…were conducted at LAN Inc.'s Chicago, Illinois location." (Complaint, ¶ 14). But these allegations provide no basis to attribute the acts of one LAN Defendant to any other LAN Defendant. Hence, Plaintiffs were required to identify the acts committed by each of the LAN Defendants. Similarly, the bare assertion that that the services of Co-Defendant Leo A. Daly are "extended through [LAN Inc.]" (Complaint, ¶ 16 (brackets original)) does not permit Plaintiffs or the Court to infer that the acts of one Defendant are the acts of another. Consequently, the Complaint is altogether insufficient against the LAN Defendants.

Here, Plaintiffs made virtually no effort to distinguish the actions of the various LAN Defendants. This is especially impermissible when Plaintiffs assert the conduct at issue is "both reckless and outrageous," without regard to specifying the allegation, per Defendant, supposedly entitling Plaintiffs to punitive damages (Complaint, ¶¶ 77, 82, 84, 92, 96). Plaintiffs impermissibly lump all Defendants together (both within and between the LAN and Veolia corporate families), broadly alleging wrongdoing without specificity as to any Defendant. The shortcomings in this approach are clear from a review of each claim, where Plaintiffs' indiscriminate approach to pleading fails to tie each Defendant's alleged acts to the elements of each claim asserted. The Complaint goes beyond mere sloppiness. It fails to plausibly and accurately distinguish between the acts and omissions of the various defendants. Each LAN Defendant is entitled to know the alleged misconduct with which it is charged. The Complaint flunks this basic test and should be dismissed.

In *Marcilis*, 693 F.3d at 596, the Sixth Circuit affirmed the dismissal of a complaint against two officers in a section 1983 action where the complaint failed to allege a specific unconstitutional act by the two officers and referred to defendants generally and categorically. *See also Robbins,* 517 F.3d at 1250 (use of collective "defendants" made it impossible for individual defendants to know what unconstitutional acts they were alleged to have committed). The same relief should issue here.

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATIONS OF 42 U.S.C. § 1983

A. The LAN Defendants are not state actors.

To prevail in an action under 42 U.S.C. § 1983, a plaintiff must establish that a defendant, acting under color of state law, deprived the plaintiff of a right secured by the Constitution and laws of the United States. *Parrott v. Taylor*, 451 U.S. 527, 535 (1981). The under-color-of-state law element excludes merely private conduct, no matter how wrongful. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

In order for a private party to act under color of state law "its actions [must] so approximate state action that they may be fairly attributed to the state." *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000). The Sixth Circuit applies three tests to determine whether a party has acted under color of state law for purposes of § 1983: (1) the "public function" test; (2) the "state compulsion" test; and (3) the "symbiotic relationship/nexus" test. *Id.*

The "public function" test allows a private party to be treated as a state actor when it "exercise[s] powers which are traditionally *exclusively reserved to the state*, such as holding elections or equivalent domain." *Wolotsky v. Huhn*, 960 F.3d 1331, 1335 (6th Cir. 1992)(emphasis supplied). Plaintiffs do not allege that the LAN Defendants performed any function *exclusively* reserved to the state.

They merely allege that "Defendants" were engaged to provide certain engineering services and were "retained" to provide professional assistance regarding the use of Flint River water. Such retention does not constitute the exercise of powers reserved "exclusively" by the state.

The "state compulsion" test requires the state to exercise such coercive power or provide such significant encouragement, covert or overt, that in law the choice of the private sector is deemed to be that of the state. *Id.* Again, the Complaint contains no allegation that the LAN Defendants acted under coercion from any public entity.

Finally, the "symbiotic relationship/nexus" test permits a private party's acts to constitute state action when there is a significantly close nexus between the state and the challenged action of the private party, to the extent that the actions of the private party are fairly attributable to the state. The ties between the private party and the state must be substantial. Neither state regulation nor the receipt of public funds converts private conduct into state action. *Lansing*, 202 F.3d at 830.

The only connection alleged between the governmental entities and the LAN Defendants is that the LAN Defendants provided certain discrete services to the City under retention. That is wholly insufficient to allege a valid section 1983 claim against a private entity. The Supreme Court has observed that many private businesses depend primarily upon public contracts to build roads, bridges, dams or public facilities for the government. The acts of such private contractors do not become the acts of the government by reason of their significant or even total engagement in performing public contracts. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982). *See also Bowman v. City of Franklin*, 980 F.2d 1104, 1108 (7th Cir. 1993) (consulting engineering firm not a state actor). No well-pleaded facts in the Complaint suggest that the LAN Defendants were acting in any capacity other than that of an ordinary contractor.

Indeed, the Complaint does not attempt to offer an explanation as to *how* the LAN Defendants acted under color of state law, except for the ludicrous reference to all Defendants allowing and facilitating the actual actors to proceed as they allegedly proceeded. It certainly does not attempt to show that the LAN Defendants qualify as state actors in any of the ways the Sixth Circuit has identified that a private defendant can be considered a state actor. The allegations are irremediably deficient and the claim should be dismissed.

B. Plaintiffs' section 1983 claims are preempted by the SDWA.

Alternatively, Plaintiffs' civil rights claims against LAN are preempted by the SDWA, 42 U.S.C. § 300g *et seq.*, which provides a comprehensive remedial scheme for alleged deprivations of constitutional rights in the field of public drinking water. This Court reached precisely this conclusion in its April 19, 2016 Order of Dismissal for Lack of Subject Matter Jurisdiction in *Boler v. Earley*, 2016 WL 1573272 (E.D. Mich., April 19, 2016) (**Exhibit C**), another case arising out of Flint's water supply.[1] In *Boler*, this Court found that "the crux of each of Plaintiffs' constitutional claims is that they have been deprived of 'safe and potable water,'" and that those claims were addressed by regulations that have been promulgated by the EPA under the SDWA. *Id.* at *3. Because the safety of public water systems is a field occupied by the SDWA, the federal remedy, both here and in *Boler*, is under the SDWA, not section 1983. *Id.* at *2-3, citing *Matoon v. Pittsfield*, 980 F.2d 1, 5-6 (1st Cir. 1992); see also *Middlesex Cty. Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 21 (1981). This Court lacks subject matter jurisdiction over the section 1983 claims, and those claims should be dismissed under Fed. R. Civ. P. 12(b)(1).

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR DECLARATORY JUDGMENT

Plaintiffs do not allege that they have or have ever had a contract with the LAN Defendants. Nor do they allege any ongoing relationship with the LAN Defendants. Rather, Plaintiffs contend that they are victims of an already completed tort and constitutional violations. A declaratory judgment is typically sought before an injury-in-fact has occurred. *National Rifle Ass'n. of Am. v.*

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[1] This Court recently issued similar orders in the companion case of *Mays v. Governor Rick Snyder*, Case No. 15-14002; 2017 WL 445637 (E.D. Mich., February 2, 2017); *McMillian, et. al. v. Governor Richard Dale Snyder, et. al., Case No. 16-10796; (E.D. Mich., February 7, 2017); Waid v Governor Richard Dale Snyder*, Case No. 16-10444; (E.D. Mich. February 7, 2017) (**Exhibit D**).

Magaw, 132 F.3d 272, 279 (6th Cir. 1997). A declaratory judgment "gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not done so." *Miami Valley Mobile Health Services, Inc. v. Exam One Worldwide, Inc.* 852 F.Supp. 3d 925, 938 (S.D. Ohio 2012), quoting 10B *Charles Alan Wright, Arthur Miller & Mary Kay Kane*, Federal Practice and Procedure, §2751 (3d ed. 1998). Where a claim has ripened into a cause of action, a claim for damages is the more appropriate remedy and the declaratory judgment claim is properly dismissed. *Id. See also Florists Transworld Delivery, Inc. v. Fleurop-Interflora,* 261 F.Supp. 2d 837, 847 (E.D. Mich. 2003) (dismissing declaratory judgment claim redundant of breach of contract claims).

Here declaratory judgment adds nothing to Plaintiffs' case. It would not determine the LAN Defendants' alleged liability for damages to any person and would not clarify any ongoing obligations of any parties. The claim should be dismissed.

VI. PLAINTIFFS FAIL TO STATE A CLAIM FOR PUNITIVE DAMAGES

Under Michigan law, punitive damages are not recoverable unless expressly authorized by statute. *Gilbert v. DaimlerChrysler Corp*., 470 Mich. 749, 765; 685 N.W.2d 391 (2004). No Michigan statute authorizes recovery of punitive damages for the Michigan common law claim asserted in the Complaint. The only statute permitting the award of punitive damages is 42 U.S.C. § 1983. However, as noted above, Plaintiffs' section 1983 claims fail since the LAN Defendants were not state actors and, more importantly, since such claims are not actionable as they are preempted by the SDWA. Thus, punitive damages are unavailable. *See* Section IV, *supra*. Even if Plaintiffs' section 1983 claims were actionable, punitive damages may be assessed only when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally-protected rights of others. *Smith v. Wade*, 461 U.S. 30, 56 (1983). As indicated, no claim under the statute may be asserted against the LAN Defendants since such claims are preempted and because Plaintiffs plead no fact showing that they acted under color of state law. Moreover, Plaintiffs plead no evil motive or intent on the part of the LAN Defendants. At most, they plead ordinary acts of negligence which do not give rise to punitive damages.

CONCLUSION AND RELIEF

The First Amended Complaint contains numerous serious deficiencies, including the unjustified "lumping" of allegations against seven separate Defendants and the assertion of actions dependent on state action against admittedly private entities. Most of the claims asserted are simply not supported by the facts alleged. The LAN Defendants request this Court dismiss the entire Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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Dated: February 16, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MELISSA MAYS, individually and as next friend of three minor children, MICHAEL MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN AND RHONDA KELSO, individually and as next friend of one minor child, all on behalf of themselves and a class of all others similarly situated,

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Defendants.

____/

PROOF OF SERVICE

The undersigned certifies that a copy of this Brief was served upon all parties to the above cause to each of the attorneys of record on February 16, 2017, by ECF, and that a copy has been mailed by United States Mail, with all postage prepaid, to any parties that are not ECF participants.

/s/Philip A. Erickson
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